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319-317—68——1

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (A. 28) is not reported. The opinion of the district court (A. 17–26) is reported at 268 F. Supp. 484. The opinion of the court of appeals on direct review of petitioner's conviction is reported at 350 F. 2d 408 (C.A. 8) and this Court's order denying a petition for certiorari to review that judgment is reported at 383 U.S. 951.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1967. A petition for rehearing was denied on August 4, 1967. The petition for a writ of certiorari was filed on November 6, 1967, and was granted on

April 1, 1968 (390 U.S. 1002). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly denied petitioner's application to proceed *in forma pauperis* on appeal from the denial of his motion to vacate sentence, under 28 U.S.C. 2255, challenging the admissibility at trial of evidence claimed to have been obtained in violation of the Fourth Amendment.

STATUTE INVOLVED

The pertinent provisions of 28 U.S.C. 2255 are:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the * * * sentence imposed was not authorized by law or otherwise

open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

STATEMENT.

In 1964 petitioner was convicted by a jury in the United States District Court for the Eastern District of Missouri of armed robbery of a federally insured savings and loan association, in violation of 18 U.S.C. 2113(a), (d), and was sentenced to twenty years' imprisonment. The conviction was affirmed on appeal, *Kaufman* v. *United States*, 350 F. 2d 408 (C.A. 8), and this Court denied a petition for a writ of certiorari, 383 U.S. 951.

On June 13, 1966, petitioner filed a motion to vacate sentence, under 28 U.S.C. 2255 (A. 3–11). The sentencing court appointed counsel to assist petitioner, and on September 9, 1966, counsel filed a supplemental motion under Section 2255, which alleged, *inter alia*, that certain items of physical evidence had been improperly admitted at trial because they had been obtained as a result of an illegal search of petitioner's automobile (A. 12–14). The court overruled the mo-

tion and supplemental motion to vacate sentence on March 16, 1967 (A. 17–26), and on March 27, the court denied petitioner's application to appeal *in forma pauperis,* and certified that the appeal was not taken in good faith (A. 27; see 28 U.S.C. 1915(a)). On May 11, 1967, the court of appeals denied petitioner's application for leave to proceed on appeal *in forma pauperis* (A. 28).

The circumstances in which the contested evidence was admitted at trial, and the disposition of petitioner's claim on direct and collateral review, are set forth below.

A. THE TRIAL

Petitioner was represented by an able and experienced appointed attorney, who subsequently was elected president of the St. Louis Bar Association (A. 18). In his opening statement to the jury at the outset of trial, and in his closing argument, counsel conceded that petitioner had committed the robbery, but contended that he was not legally responsible for the crime by reason of mental illness (A. 36–38, 127, 131, 134). With the approval of petitioner's counsel, the court instructed the jury that the only contested issue in the case was whether petitioner was legally sane at the time he committed the robbery (A. 145, Tr. 478).

1. At about 4 p.m. on December 16, 1963, petitioner entered the River Roads Branch of the Roosevelt Federal Savings and Loan Association in Jennings, Missouri, a suburb of St. Louis (A. 39). After being refused a request to purchase travelers' cheques with a personal check, petitioner engaged the branch

manager in a conversation about a G.I. loan, and expressed an interest in opening a savings account. While the manager was filling in an account application form, petitioner drew a pistol and ordered the manager to give him cash and all the travelers' cheques in the branch (A. 41–44). The manager gave petitioner about $328 in cash, including 50 one-dollar bills whose serial numbers had been recorded, and two packets containing $11,520 in American Express Travelers' Cheques (A. 44–47). Petitioner put the cash in the pockets of his overcoat and held the packets under his arm. He then ordered everyone in the office to go into a rear supply room, and left the building about 4:20 p.m. (Tr. 49–50). At trial, petitioner was identified as the robber by the branch manager, the assistant manager, and a customer who entered the office during the robbery (A. 39, 49–50).

2. The government introduced several items of evidence which were taken from petitioner's person during his detention in a local police station and from his automobile while it was being held on the premises of a private towing company. No motion to suppress this evidence was made before or during trial, but the circumstances in which the evidence was obtained were substantially developed in the testimony at trial.

Shortly after the robbery, at about 4:35 p.m., Officer Stahl of the Alton, Illinois, Police Department received a radio broadcast instructing him to intercept a 1963 red Rambler bearing New York License 8Z6367 which had been involved in a hit-and-run accident in Missouri (A. 53–54, 60). About five minutes

later, he observed the car proceed into Alton over the bridge from Missouri and followed it for a few blocks. When he motioned to the driver to pull over to the curb, the car attempted a sharp right turn, skidded on a patch of ice, and crashed into a tree on the left side of the street (A. 54, 61–63). Petitioner, the driver of the Rambler, got out of the car and, when asked about the accidents, he told Officer Stahl that he was drunk and gave his name as "Donald Taylor" (A. 54–55). Officer Stahl placed petitioner under arrest and called for a wrecker to tow the damaged car from the street. He then transported petitioner to the Alton Police Station, where they arrived at about 4:45 p.m. (A. 55–56).

F.B.I. Agent George Peet, who had been investigating the savings and loan robbery, went to the Alton Police Station upon being informed that the driver of the hit-and-run car had been arrested (A. 102-103). He arrived at the police station at about 5:45 p.m., while petitioner was being processed for detention (photographing, fingerprinting, etc.) by the Alton Police (A. 98). Thereafter, Agent Peet questioned petitioner to determine whether he had been involved in the robbery. Petitioner stated that he had driven from New York to St. Louis for the purpose of committing a robbery, and gave an account of the robbery similar to that of the branch manager (A. 95). He said that he saw a police car as he drove out of the savings and loan's parking area and, thinking the police were after him, he "panicked and drove

off very hurriedly" and hit another car while making his escape (A. 96).[1]

When petitioner completed his statement at about 6:40 p.m., Agent Peet reported that information to his superior, Agent Morley, who told him that federal charges would be filed against petitioner. Agent Peet returned to petitioner and advised him that he would be prosecuted on a federal robbery charge. The witnesses to the robbery were then brought to the police station to identify petitioner (A. 103–104).

Agent Morley directed Agent Albert Rushing to go to the Alton Police Station to assist in the investigation (A. 85). When Agent Rushing arrived, Captain Peterson of the Alton Police Department turned over to him a rental contract for the Rambler automobile in the name of Arthur Cooper and $352.03 in cash, including 70 one-dollar bills, which had been recovered from petitioner's person by the Alton Police at the station house (A. 80–81, 70–71, 67–68). Agent Rushing signed a receipt assuming custody of petitioner, and at about 8 p.m. petitioner was removed to the F.B.I. office in St. Louis (A. 87, 103).

Shortly after petitioner had been taken to the Alton Police Station, Clifford Martin, the operator of a private towing service, towed petitioner's disabled automobile to his garage (A. 64). While he was inspecting the car at the garage, he observed a revolver, in plain view, on the rear seat of the car (A. 65). He telephoned this information to the Alton Police Department, and Officer Stahl was sent out to the ga-

[1] The substance of petitioner's statement was brought out on *voir dire* examination of Agent Peet after the jury had been excused (A. 94–105); it was not repeated in testimony before the jury.

rage. Martin then removed the revolver (which was fully loaded) and, at Stahl's instructions, placed it in a locked drawer in his office. (A. 59–60, 65). Martin gave the revolver to the F.B.I. agents later that evening.

At about 7:30 p.m. that evening (December 16), Agent Morley instructed Agent John Newcomer to go to Cliff Martin's garage to search petitioner's automobile (A. 79). Agent Newcomer found two packets containing the stolen travelers' cheques on the floor board of the car (A. 73). He also discovered a traffic summons from New York City dated December 14, two gasoline sales receipts dated December 15 from Pennsylvania, and a receipt for a Western Union telegraph money order sent by "Paul King" from Harrisburg, Pennsylvania, on December 15 (A. 74–75). The search was conducted without a warrant.

The items recovered from petitioner's person at the Alton Police Station—the rental contract (Govt. Ex. 8, A. 67–68, 83) and the money (Govt. Ex. 13, A. 81, 83)—were admitted in evidence over petitioner's objection that they were illegally seized because petitioner was not in custody for a federal offense at the time they were obtained (A. 83, see A. 68). Agent Rushing testified that the serial numbers on 50 of the one-dollar bills recovered from petitioner's person were identical with the serial numbers of the bills which had been stolen from the savings and loan association (A. 82–83; Govt. Ex. 3, A. 46–48).

The revolver which had been found and removed from the automobile by Cliff Martin was admitted in evidence without objection (Govt. Ex. 6, Tr. 59–60).

The manager of the branch testified that the revolver was similar to the one petitioner carried during the robbery (A. 43). The manager of a gun shop in Alton testified, without objection, that petitioner had purchased the revolver from his store on the day of the robbery (A. 51–52).

The two packets of travelers' cheques recovered in the F.B.I.'s search of the car were admitted in evidence without objection (Govt. Exhs. 5–A and 5–B, A. 48). The branch manager identified them as the packets which he gave to petitioner (A. 46), and Agent Newcomer testified that the serial numbers on the travelers' cheques were identical with the serial numbers on the savings and loan association's inventory list (A. 74–75; Govt. Ex. 4, A. 45–46, 48).

The other items recovered in the search of the car—the traffic summons, two gasoline receipts, and the Western Union receipt—were admitted in evidence over petitioner's objection that they were not relevant and that they had been illegally seized because petitioner was in the custody of local authorities and was not under arrest on federal charges at the time the car was searched (Govt. Exhs. 9–12, A. 75–78). Petitioner's girl friend, Mrs. Patricia Scott, testified on cross-examination that the Western Union receipt (Govt. Ex. 11) evidenced a $50 money order which petitioner, using the name "Paul King," had sent to her (A. 89–90). The traffic summons and the gasoline receipts were not referred to in the testimony other than at the time of their admission.

3. The theory of the defense was that petitioner was unable to control his actions on the day of the rob-

bery because of a mental disorder, which was diagnosed as "schizophrenic reaction, paranoid type, in partial, rather stable remission" by the psychiatric staff of the Federal Medical Center (Springfield, Missouri) in February 1964, about two months after the robbery (Tr. 223, 225). Dr. Glotfelty, who had examined petitioner at Springfield, was called as a defense witness, but was unable to give an opinion whether petitioner had been able to control his actions on the day of the robbery (Tr. 223, 235, 247). He testified that at some time prior to the examination, petitioner's condition might have been more severe, so that he would have had difficulty controlling his actions, but that this could be more accurately determined by persons who had observed petitioner in November or December (Tr. 231–234, 253–254).

Dr. Waitzel, also called as a defense witness, had last examined petitioner in December 1960, and had not found him to be psychotic at that time (Tr. 263, 270). He substantially concurred in the medical center's diagnosis (Tr. 280). But he stated that in his opinion, based significantly on the testimony at trial, petitioner could have been unable to control his impulse to commit crime in December 1963 (Tr. 292–294). In explaining the nature of schizophrenia to the jury, Dr. Waitzel testified that the disease did not necessarily impair the individual's capacity for planning his activities or for responding intellectively to everyday problems (Tr. 282–284, 296, 326).

Mrs. Patricia Scott, with whom petitioner associated almost constantly from August to December 1963, testified to petitioner's nervousness and eccen-

tric behavior, his fears for his safety resulting from his indebtedness to an underworld figure, and his desire to be recognized as a successful robber (Tr. 131, 148–152, 156–157, 160–161, 176). Mrs. Scott testified that, in her opinion, petitioner was not sane (Tr. 171). Detective Kiernan of the New York City Police Department testified concerning petitioner's activities as an informer (Tr. 202–204). He stated that petitioner appeared to be nervous, but that he did not believe petitioner was insane (Tr. 207–209).

In rebuttal, the government called Dr. Weiland, who also examined petitioner at Springfield. He testified that there was no medical evidence indicating that petitioner had been unable to control his behavior at the time of the robbery. (Tr. 338). Dr. Davidson, an internist who examined petitioner on the evening of December 16, testified that petitioner did not display any anxiety or any gross manifestation of psychosis or neurosis (Tr. 365, 367). Two F.B.I. agents who questioned petitioner after his arrest testified that he did not seem unusually nervous and that his answers were responsive and logical (A. 107–109, 119–121).

B. DIRECT REVIEW OF THE CONVICTION

Petitioner filed a notice of appeal and new counsel was appointed. On appeal, counsel briefed and argued several points relating to the insanity defense and two other claims of alleged interference with petitioner's right to counsel. No contention was advanced that the search of petitioner's car was illegal (See Pet. Ex. D). Petitioner's appeal was argued on March 9, 1965. Thereafter, on April 26, 1965, petitioner wrote a letter

to appellate counsel, stating that he had "discovered" that the search of his car was illegal under *Preston* v. *United States*, 376 U.S. 364, and urging counsel to present that issue to the court (Br. App. D, pp. 62–63; see n. 16, *infra*). Counsel forwarded this letter to the Clerk of the Eighth Circuit Court of Appeals (Br. App. D, p. 61), and on June 18, 1965, the Clerk notified counsel that the letter had been given to the panel which was considering the appeal (Pet. Ex. G). The court affirmed the conviction on September 8, 1965, without direct reference to the search and seizure claim. 350 F. 2d 408. A petition for a rehearing was denied.

In his *pro se* petition for a writ of certiorari (No. 1025 Misc., O.T. 1965), petitioner contended that the search and seizure of items from his car was illegal. He also claimed that he was under the influence of drugs at the time of trial and that the government had knowingly suppressed a witness material to his defense. In its brief in opposition, the government argued that the facts of record showed the search to have been proper and that, in any event, the introduction of those items would not warrant reversal because petitioner did not dispute the commission of the offense. The petition was denied. 383 U.S. 951.

C. THE SECTION 2255 PROCEEDING

The only claim presented in petitioner's original motion to vacate sentence was that he was unable to consult with or effectively assist counsel because the drug librium (a tranquilizer) had been administered to him before and during trial (A. 3–11). District Judge John

K. Regan, who had presided at petitioner's trial, ordered a hearing on the motion and appointed counsel to assist petitioner. On September 9, 1966, counsel filed a supplemental motion under Section 2255, realleging the claim asserted in petitioner's motion and presenting two additional claims which had been raised in the petition for a writ of certiorari—that the government had withheld information concerning the whereabouts of a defense witness and that the search of petitioner's automobile was illegal because it was conducted without a warrant (A. 12–14).

After an evidentiary hearing, which apparently focused primarily, if not exclusively, on the competency and suppression questions, Judge Regan found those contentions to be without merit (A. 17–26, 268 F. Supp. 484). With respect to the search and seizure claim, the court stated (A. 21, 268 F. Supp. at 487):

> The supplemental motion to vacate, prepared by appointed counsel, asserts as a further ground for relief that certain physical evidence was obtained by an allegedly unlawful search and seizure of Kaufman's automobile after his arrest. The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack on the instant § 2255 motion. * * *

On March 22, 1967, petitioner, apparently with the assistance of counsel who represented him on the motion, filed an application for leave to appeal *in*

forma pauperis (R. 83). The affidavit in support of the application merely recited, in summary form, all of the grounds alleged in the supplemental motion to vacate (R. 84–85). On March 27, the district court certified that the appeal was not taken in good faith because petitioner's affidavit did not "state the nature of the appeal nor his belief that he is entitled to redress. * * * In our judgment the appeal in this case is frivolous and wholly without merit" (A. 27).

On May 11, 1968, the court of appeals entered the following order denying petitioner's motion for leave to proceed *in forma pauperis* filed in that court (A. 28):

> The Court has considered a motion for leave to proceed on appeal in forma pauperis, and in connection with that motion has examined the original files of the United States District Court for the Eastern District of Missouri.
>
> Being fully advised in the premises, it is now here ordered that the motion for leave to proceed on appeal in forma pauperis be, and it is hereby, denied.

In his petition for a writ of certiorari in this Court (No. 890 Misc., O.T. 1967), prepared with the assistance of present counsel, petitioner presented two questions: whether the court of appeals improperly refused to consider his search and seizure claim on direct appeal, and whether, in view of the disposition of his search and seizure claim on direct appeal and on collateral attack in the district court, he was improperly denied appellate review of that claim by the court of appeals' refusal to allow him to proceed *in forma pauperis*. Petitioner's argument rested

heavily on the assumption that the court of appeals did not consider the claim on direct review, and on the assertion that he had urged appellate counsel to brief and argue that issue (Pet. 3). Petitioner did not state, however, that he had conceded the commission of the robbery at trial and had relied solely on a defense of insanity.

In its memorandum in opposition, the government interpreted the gravamen of the petition as a challenge to the district court's statement that petitioner could not raise the search and seizure claim collaterally because he had not assigned it as error on direct appeal. The government took the position, in accord with a substantial body of court of appeals decisions, that petitioner's failure to move to suppress the evidence at trial precluded him from raising the issue on appeal, and therefore, it was not available on collateral attack. We also noted that petitioner had conceded the commission of the robbery at trial.[2]

In his brief in this Court, petitioner seeks to present three questions: whether a conviction based upon illegally seized evidence is subject to collateral attack under Section 2255; whether the failure of the court of appeals to consider his search and seizure claim on direct review entitles him to a disposition on the merits of that claim in a Section 2255 proceeding;

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[2] In a reply brief to the government's memorandum in opposition, petitioner asserted (p. 2) that the prosecutor, in response to counsel's objection to the admission of the evidence recovered from the automobile, had stated that "all the papers in the car are essential to our prosecuting on the insanity issue." No such statement appears at that point (A. 76–78), or at any other point, in the record.

and whether the searches of his automobile and of his *person* were lawful.

INTRODUCTION AND SUMMARY OF ARGUMENT

We have recited the facts in considerable detail because the issues presented to this Court appear to have become somewhat diffused. What this case involves, in our view, is a challenge to the admission of three items of evidence—a traffic summons, gasoline receipts, and a money order receipt—raised collaterally after a trial in which petitioner conceded the commission of an armed robbery and defended solely on the ground of insanity. Although the stolen travelers' cheques and a revolver were also recovered from petitioner's automobile, their admission in evidence presents no serious question. The case does not involve the validity of the search of petitioner's person, because the admission of the evidence obtained in that search was not challenged in petitioner's motion to vacate sentence. Finally it does not involve the admission of other evidence which petitioner challenges for the first time in this Court by asserting facts outside the record.

The procedural posture of the case initially presents the narrow issue whether the court below properly denied leave to proceed *in forma pauperis*. Although it does not seem likely that the petition was granted solely to consider that issue, we believe that it presents a basis on which the decision below may be affirmed, because even if the evidence was erroneously admitted, it was a plainly harmless error which would not justify plenary consideration on appeal.

The more significant issue, however, which the Court may find it necessary to reach, is whether petitioner's claim of illegal search and seizure is cognizable by motion under Section 2255. In view of the position we take on this issue, we believe that the present record is adequate to decide the question without further proceedings in the courts below. We argue that, in the circumstances of this case, petitioner's failure properly to present his search and seizure claim at trial and on direct review should bar him from raising that claim collaterally.

In the event the Court should hold that petitioner is entitled to collateral review of the challenged search and seizure, we think that this record is adequate to allow disposition of that claim on its merits at this stage. The testimony at trial establishes that the search of the automobile was entirely lawful.

I.

A court of appeals may properly deny leave to proceed *in forma pauperis* if the issues sought to be raised are patently frivolous. The decision below may be sustained on the ground that petitioner's claim of illegal search and seizure presents a plainly harmless error which would not justify setting aside his conviction. The evidence which petitioner challenges—a traffic summons, gasoline receipts, and a money order receipt—clearly did not have any probative value, by themselves, on the question of petitioner's sanity. Although the prosecutor briefly referred to the evidence at the outset of his closing argument, the substance of his statement was merely that petitioner had

driven from New York to St. Louis to commit the robbery. That statement could have been made on the basis of other evidence in the case. In view of the nature of the psychiatric testimony and the other evidence of petitioner's behavior on the day of the robbery, which was more fully discussed in the closing argument, the seized evidence plainly did not affect the jury's verdict.

II

Regardless of the extent to which a State prisoner may obtain relief on federal habeas corpus on the basis of a claim of illegal search and seizure, there are sound reasons why the federal courts should decline to exercise jurisdiction to grant collateral relief to a federal prisoner who has failed properly to present his search and seizure claim at trial and on appeal. The federal defendant, unlike the State defendant, may try his claim to a federal judge, preferably in advance of trial, and obtain appellate review within the federal system. The requirement of early litigation of search and seizure claims is designed to ensure more accurate findings of fact, to protect the defendant by aborting prosecutions which cannot be maintained without the suppressed evidence, and to save the government from avoidable error by resolving questions as to the admissibility of seized evidence which, as in this case, is wholly immaterial to obtaining a conviction. Furthermore, the deterrent principle on which the exclusionary rule rests is severely attenuated when the rule is invoked on collateral attack, often many years after the search. In the absence of circumstances showing that he was impeded in the

presentation of his search and seizure claim, there is no reason why a federal defendant who did not exercise his right to have that claim authoritatively disposed of, after full litigation, in the conviction proceedings should be permitted to present that claim to the same courts in a collateral proceeding.

There are no exceptional circumstances in this case which would entitle petitioner to collateral relief on the basis of his search and seizure claim. Petitioner fully agreed with his able trial counsel to concede the commission of the offense and to rest solely on an insanity defense. The seized evidence challenged here was plainly immaterial to that defense, and counsel had no cause to contest its admission by requiring a hearing on a motion to suppress. Appellate counsel also considered the claim and found it to be of little merit, but he did bring the issue to the attention of the court, after argument, at petitioner's insistence.

III

The testimony at trial is adequate to refute petitioner's contention that the evidence was illegally seized. The revolver was observed in plain view on the back seat of the automobile by a private individual who had been called to tow the disabled vehicle off the street. It was obtained without a search and without the intervention of any law enforcement agency. At the time the F.B.I. agent searched the automobile, it was known that it had been used as an instrumentality in the commission of a federal offense and that it did not belong to petitioner but had been rented by someone else. The automobile, therefore,

was properly taken into custody; it was to be retained by federal authorities until trial and then returned to its owner. The reason petitioner was taken into custody by the F.B.I., the reason the car was seized, and the reason it was searched, were all the same. In almost identical circumstances this Court upheld a warrantless search in *Cooper* v. *California*, 386 U.S. 58.

ARGUMENT

I. SINCE THE EVIDENCE SEIZED FROM PETITIONER'S AUTOMOBILE PLAINLY DID NOT AFFECT THE VERDICT, THE COURT BELOW WAS NOT REQUIRED TO GIVE PLENARY CONSIDERATION TO PETITIONER'S CLAIM, BECAUSE EVEN IF HE COULD ESTABLISH THAT THE SEARCH WAS ILLEGAL, HE WOULD NOT HAVE BEEN ENTITLED TO RELIEF

In view of the procedural posture of this case, the narrow, and perhaps dispositive, issue presented here is whether the court below properly denied petitioner's application for leave to proceed *in forma pauperis*. The Court held in *Coppedge* v. *United States*, 369 U.S. 438, that such an application must be granted unless it appears that the issues raised are so lacking in merit that the appeal would be dismissed, if filed by a nonindigent appellant, without plenary consideration. See also, *Ellis* v. *United States*, 356 U.S. 674. As noted above (p. 14, *supra*), the court of appeals did not articulate the grounds for its denial of petitioner's application, although it did state that it had reviewed the files and proceedings with respect to petitioner's conviction. We think that the most obvious, and most likely, basis for the court's decision was that in the circumstances of this case, it plainly appeared that the evidence seized from petitioner's

automobile was so insignificant to the jury's finding, that any error in the admission of that evidence was harmless error, which did not entitle petitioner to relief.

We believe that the decision below may be sustained on that ground, without determining whether petitioner was entitled to raise his claim of illegal search and seizure by a Section 2255 motion or whether the evidence in fact had been illegally seized. Although the policies announced in *Coppedge* may, to some extent, limit the application of the harmless error rule as a ground for denial of leave to proceed *in forma pauperis* on *direct appeal* from a conviction, different considerations are presented when leave is sought to appeal from a denial of Section 2255 relief. In the present case, the court of appeals had previously reviewed petitioner's trial on direct appeal, being apprised of the belated claim of illegal search and seizure, and this Court had denied a petition for a writ of certiorari which raised the search and seizure issue. Petitioner's claim was then heard and rejected on collateral attack by the district judge who presided at his trial. In these circumstances, no useful purpose is served by requiring a court of appeals which is familiar with the facts of the case and with the significance of the challenged evidence at trial to allow petitioner to brief and argue a claim which, even if established, would not justify his release.

Our position is premised, of course, on the assumption that the harmless error rule applies equally to claims raised collaterally as well as to those presented on direct appeal. That is, if the admission of

illegally seized evidence could properly be found to be harmless error by a court of appeals, a convicted defendant who established that claim in a Section 2255 proceeding would not be entitled to release. Whatever standards may govern the scope of collateral proceedings to litigate claims which were, or could have been, presented at trial and appeal (see Part II, *infra*), it would obviously make a mockery of the appellate process to require the courts, on collateral attack, to set aside final convictions on the basis of insignificant errors which would not justify reversal on direct appeal. In *Bumper* v. *North Carolina*, 391 U.S. 543, 550, the Court indicated (although it does not appear to have been theretofore seriously doubted)[3] that the harmless error rule is applicable on direct review of search and seizure claims. At a time when the federal courts are dealing with an increasing volume of collateral attacks on State convictions, they should not be required to give plenary consideration on Section 2255 motions to search and seizure claims in respect of evidence which plainly had no affect on the conviction.

Assuming *arguendo* that the search of petitioner's automobile was invalid (but see pp. 42–43, *infra*), the admission into evidence of the items seized—a traffic summons, two gasoline receipts, and a Western Union receipt[4]—presents the clearest instance of harmless

[3] Compare *Fahy* v. *Connecticut*, 375 U.S. 85; *Chapman* v. *California*, 386 U.S. 18, 44 n. 2 (Stewart, J., concurring).

[4] The irrelevance of the revolver and the stolen travelers' cheques to petitioner's insanity defense is too plain to require argument. Furthermore, the seizure of the revolver was clearly lawful, see pp. 41–42, *infra*.

error. Petitioner cannot contend that he was prejudiced by the jury's consideration of that evidence on the question whether he committed the robbery. Not only did he concede that fact throughout the trial, but he was positively identified by three eye-witnesses to the robbery. Nearly three-quarters of the record is comprised of expert and lay testimony on the only issue which petitioner contested—his sanity at the time of the offense. The evidence presented in petitioner's behalf, summarized above and in the court's opinion on direct appeal (pp. 9–11, *supra;* 350 F. 2d at 410–412), was far from compelling on the issue of petitioner's sanity. And as defense counsel argued, there was no testimony which would suggest that petitioner's ability to plan his activities and to attend to routine matters would be inconsistent with an inability to refrain from unlawful conduct (A. 129; see p. 10, *supra*).

It cannot be argued that a traffic summons, a Western Union receipt, and two gasoline receipts had any probative value, by themselves, on the question of petitioner's sanity at the time of the robbery. In an attempt to show that the evidence influenced the jury's verdict, petitioner relies, apparently for the first time in his brief in this Court (Br. 11, 42), on a portion of the prosecutor's initial closing argument in which those items were mentioned. This contention magnifies a single paragraph out of all proportion to its significance in the context of the argument itself and of the trial as a whole. The substance of the paragraph which petitioner cites was that petitioner drove the automobile from New York to St. Louis and stopped along the way to purchase gasoline and to telegraph

money to his girlfriend in New York. In the course of that statement, the prosecutor alluded to the rental contract, which was not raised in the motion to vacate sentence since it was recovered from petitioner's person, and to the traffic summons and the receipts.

The paragraph relied on by petitioner was only the introduction to a much longer and more detailed discussion of petitioner's conduct in St. Louis and Alton on the day of the robbery (A. 123–126). In view of the nature of the psychiatric testimony on the question of petitioner's sanity, as well as the other testimony with respect to petitioner's behavior on the day of the robbery, it stretches the imagination too far to suppose that the jury's finding of sanity was measurably affected by the evidence that petitioner drove to St. Louis, purchased gasoline, and sent a telegram. See *Chapman* v. *California*, 386 U.S. 18, 24. Furthermore, even if the challenged evidence had been excluded, the introduction to the prosecutor's argument would not have been materially different. The fact that petitioner was driving a car with New York license plates on the day of the robbery, that he was in possession of a rental contract for the car issued in New York, and the testimony of Pat Scott that he left New York with the expressed purpose of committing a robbery,[5] provided a basis on which the prosecutor could have made a proper argument that petitioner had driven from New York to St. Louis. Evidence that peti-

[5] At one point Mrs. Scott testified that "I think [petitioner] said he was going to fly" (Tr. 185). To the extent that statement was inconsistent with petitioner's activities, the jury may have disregarded it, as petitioner himself has elected to do in this Court, see Br. 44–45 & n. 7.

tioner purchased gasoline for his car and telegraphed $50 to Mrs. Scott added nothing of significance.[6]

Petitioner also argues—for the first time in this Court, and without any support in the record—that the search of the car also disclosed a receipt for the purchase of the revolver and that the receipt, or the serial number on the revolver itself, led the agents to the manager of the gun shop, whose testimony, petitioner contends, should have been excluded as the "fruit" of an illegal search (Br. 7–8, 41–42). That argument proceeds from an erroneous premise, and in no event does it require reversal of the decision below.

Since petitioner's counsel saw fit to raise a new contention in this Court based on a factual assertion in a recent letter from his client (Br. 7–8 nn. 1, 2), it is appropriate to refute that contention by the use of facts not of record. A receipt for the purchase of the revolver was recovered, but it was found on petitioner's *person* by the Alton Police, not in his car, and is listed in the inventory of items which the Alton Police turned over to the F.B.I.[7] Since petitioner's motion to vacate did not challenge the legality of the search of his person, his present contention is not properly before this Court. In addition,

[6] Mrs. Scott testified that petitioner had previously wired money to her when he was away from New York City (Tr. 145).

[7] The report showing the receipt for the purchase of the revolver listed among the personal effects taken from petitioner by the Alton Police was turned over to defense counsel for his inspection during trial (A. 84–85).

as we show below (see p. 41, *infra*), the search of his person was plainly lawful.

Second, as petitioner acknowledges (Br. 8–9 n. 2), the identity of the gun-shop manager could have been obtained by tracing the serial number on the revolver. The revolver was not obtained as the result of a search by any police officer, but was seen by a private citizen in plain view on the back seat of the automobile, and was removed and kept by him until it was turned over to the F.B.I. Those facts present no question of illegality under the Fourth Amendment. See *Harris* v. *United States*, 390 U.S. 234; pp. 41–42, *infra*.

Finally, even under the improbable assumption that the shop manager's testimony was derived from illegally obtained evidence, the admission of that testimony was at most an obviously harmless error which, for the reasons stated above, did not entitle him to relief. Insofar as the shop manager's testimony was relevant to petitioner's insanity defense, he stated that petitioner "talked very normal" and "appeared to me not to be nervous" at the time he purchased the revolver (A. 52). And in the portion of the prosecutor's closing argument cited by petitioner (Br. 12), the prosecutor referred to the purchase of the gun and stated that petitioner "displayed no nervousness" and that his conversations "appeared to the salesman to be perfectly normal" (A. 124).

That evidence has none of the significance which petitioner attempts to attach to it. The shop manager's testimony was consistent and cumulative with the testimony of seven other witnesses who stated that

petitioner did not exhibit any unusual nervousness and was coherent and rational on the day of the robbery: the branch manager of the savings and loan association (Tr. 30), the assistant manager (Tr. 48), a customer who entered the branch office during the robbery (Tr. 53), a doctor who examined petitioner after he was removed to the St. Louis F.B.I. office (Tr. 365), Agent Peet, who questioned petitioner at the Alton Police Station (A. 107–109), and Agent Walls and Chief Obertz, who were present during the questioning (A. 119–121; Tr. 429–431). In his closing argument the prosecutor referred to all of that testimony in tracing petitioner's activities throughout the day of the robbery, and emphasized the fact that there was no evidence that petitioner displayed any unusual nervousness during the robbery, at the time of his arrest, or during the time he was being questioned (A. 124–126). Indeed, defense counsel argued that petitioner's calmness on the day of the robbery was evidence of his abnormal mental condition (A. 131–132).

II. PETITIONER IS NOT ENTITLED TO COLLATERAL REVIEW OF HIS CLAIM OF ILLEGAL SEARCH AND SEIZURE

A. A CLAIM OF ILLEGAL SEARCH AND SEIZURE IS NOT COGNIZABLE, IN THE ABSENCE OF EXCEPTIONAL CIRCUMSTANCES, ON MOTION TO VACATE SENTENCE

If the Court does not accept the foregoing argument, *Coppedge* v. *United States, supra,* would suggest that the judgment should be reversed and the cause remanded with instructions to the court of appeals to entertain petitioner's appeal *in forma pauperis.* In that event, a principal issue on appeal would be

whether petitioner's search and seizure claim is cognizable on a motion to vacate sentence. Since that is the issue on which the petition and the government's opposition seem to have focused, we assume that the Court would wish to consider, and perhaps to decide, the merits of the question. For reasons which follow, we believe that petitioner may not maintain his search and seizure claim collaterally and that the judgment below should be affirmed on that ground, without remand to the court of appeals. We agree with the position taken by the Court of Appeals for the District of Columbia Circuit in *Thornton* v. *United States*, 368 F. 2d 822, that absent exceptional circumstances (see pp. 37–39, *infra*), not present in this case, a federal prisoner is not entitled to have his sentence set aside, under Section 2255, on the basis of a search and seizure claim which he failed properly to present at trial and on appeal. See Amsterdam, *Search, Seizure, and Section 2255—A Comment*, 112 U. Pa. L. Rev. 378.

Prior to this Court's decision in *Mapp* v. *Ohio*, 367 U.S. 643, the exclusionary rule with respect to evidence seized in violation of the Fourth Amendment was not deemed to be of constitutional dimension. Accordingly, a claim that such evidence had been admitted at trial was not cognizable on collateral attack in the federal courts. As this Court implicitly held last Term, however, the announcement of a constitutional predicate for the exclusionary rule opens the issue of illegal search and seizure to review on federal habeas corpus by State prisoners. *Mancusi* v. *DeForte*, No. 844, O.T. 1967 (decided June 17, 1968); *Carafas* v. *LaVallee*, 391 U.S. 234; see *Warden* v. *Hayden*, 387

U.S. 294; *Henry* v. *Mississippi*, 379 U.S. 443, 452. Reasoning from this Court's holdings that the scope of relief under Section 2255 is intended to be coextensive with the remedy available by writ of habeas corpus,[8] petitioner concludes (Br. 18) that federal prisoners must likewise be afforded collateral review, under Section 2255, of search and seizure claims.

1. Petitioner's argument, in our view, does not adequately present the competing policies which shape this issue. Because search and seizure claims have only recently come within the standards of habeas corpus jurisdiction, the particular considerations which such claims present have not been before the Court in cases in which the reach of the habeas corpus remedy has been in issue. In large part, the present scope of federal collateral relief has been forged in cases presenting claims of coerced confession[9]—a claim which, if proved, establishes that the petitioner has been convicted through the use of evidence which is inherently prejudicial[10] and which impugns the integrity of the fact-finding process. The claim of illegal search and seizure, however, possesses neither of those attributes. The exclusionary rule which it invokes is not designed to punish the offending of-

[8] *Sanders* v. *United States*, 373 U.S. 1, 13–14; *Hill* v. *United States*, 368 U.S. 424, 427; *United States* v. *Hayman*, 342 U.S. 205, 210–219.

[9] *E.g.*, *Fay* v. *Noia*, 372 U.S. 391; *Townsend* v. *Sain*, 372 U.S. 293; *Rogers* v. *Richmond*, 365 U.S. 534; *Brown* v. *Allen*, 334 U.S. 443. Compare *Machibroda* v. *United States*, 368 U.S. 487 (involuntary guilty plea); *Sanders* v. *United States*, *supra* (incompetency).

[10] *Chapman* v. *California*, *supra*, 386 U.S. at 42–43 (Stewart, J., concurring).

ficer, or to redress the victim, or to prevent his conviction on the basis of unreliable evidence: it is a prophylactic device intended generally to deter Fourth Amendment violations.[11] As the Court recognized in *Linkletter* v. *Walker,* 381 U.S. 618, 639, in which the extension of the exclusionary rule to State trials was denied retroactive application, the claim of illegal search and seizure, raised collaterally, challenges the admission of evidence "the reliability and relevancy of which is not questioned, and which may well have had no effect on the outcome."

The collateral availability of search and seizure claims, therefore, presents new and difficult questions. Before such claims are afforded the scope of collateral reviewability designed to correct the admission of unconstitutionally obtained evidence which is always prejudicial, it must be asked whether it would not be more appropriate to formulate a rule which is more sensitive to the varying degrees of importance which physical evidence may have at trial. The manifest importance, or insignificance, of the challenged evidence in the context of the trial should be a highly relevant consideration in determining whether the interests of justice would be served by entertaining collaterally a search and seizure claim which was not properly presented in the original proceedings.

Before search and seizure claims are afforded the scope of collateral reviewability designed to correct the admission of unreliable evidence, or to enlarge

[11] See *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 217; *Linkletter* v. *Walker*, 381 U.S. 618, 636; *Mapp* v. *Ohio*, 367 U.S. 643, 657–658.

the victims of proceedings which are shocking to our sense of justice, it must be asked whether the social cost of that result is a necessary price to pay for the enforcement of the exclusionary rule. In order to deter official lawlessness, the exclusionary rule sets free persons who have been, or could have been, properly convicted on the basis of reliable evidence. Granted that the delicate balance which underlay that rule was long ago resolved,[12] the effectiveness of the deterrent power of the rule remains the guiding consideration in determining the circumstances in which the rule may be enforced. *Linkletter* v. *Walker, supra.* The inherent limitations of the exclusionary rule as a deterrent have been recognized. *Terry* v. *Ohio,* 392 U.S. 1, 13–15 & n. 9. The rule works capriciously, but we must assume that it works most successfully, if it works at all, when its consequences are most visible to the offending officer and his colleagues—that is, when it is enforced at or before trial, while the circumstances of the search are easily recalled and the success of the prosecution is a matter of importance to the police. We do not know precisely to what extent, if any, the officer's motivation to respect Fourth Amendment rights is diminished by a defendant's failure to raise a search and seizure claim at trial; nor do we know to what extent, if any, his conduct would be affected by the release of the defendant in a collateral proceeding years removed from the search. But in either case, the likely affect would appear to be slight. See *Thornton* v. *United States, supra,* 368 F. 2d at 828. In view of the manifest opportunities for a federal defendant

[12] In *Weeks* v. *United States*, 232 U.S. 383.

to enforce the exclusionary rule before or at trial (see pp. 34–35, *infra*), and thus satisfy the public's interest in maintaining its deterrent effect, a relatively remote possibility of deterrence would not seem to justify the collateral release, except in special circumstances, of unquestionably guilty persons who elected not to raise the issue at trial.

2. Petitioner's argument also rests on the doubtful premise that the circumstances in which the federal courts may properly decline to exercise jurisdiction to grant relief on a search and seizure claim—a discretion which this Court recognized in *Fay* v. *Noia*, 372 U.S. 391, 438–439, in the context of a coerced confession claim by a State prisoner—are identical for both State and federal prisoners. For well recognized reasons, federal habeas corpus has become the "preferred" vehicle for assuring that federal constitutional rights are vindicated in State criminal proceedings. The inadequacy of State procedures to raise and preserve federal claims, the concern that State judges may be unsympathetic to federally created rights, and the institutional constraints on the exercise of the Supreme Court's certiorari jurisdiction to review State convictions, support the rule that a State prisoner may litigate, or relitigate, the facts underlying his federal constitutional claim before a federal judge. See *Brown* v. *Allen*, 344 U.S. 443. In recognition of the fact that a federal defendant may, in extraordinary circumstances, be impeded in presenting his search and seizure claim, a collateral forum for the enforcement of Fourth Amendment rights should never be foreclosed. But absent such circumstances,

there appears to be no compelling reason why the federal courts should exercise their jurisdiction under Section 2255 to entertain search and seizure claims.

The federal defendant, unlike his State counterpart, is entitled, indeed required, to litigate his search and seizure claim in a special proceeding before a federal judge in advance of trial; he may raise and try the claim during trial to a federal judge; he has the right to appeal an adverse ruling to a federal court of appeals; and if theretofore unsuccessful, he may petition for a writ of certiorari on a record made entirely in federal proceedings. In the case of a defendant whose search and seizure claim was fully presented and fairly heard, and rejected, at each of the foregoing steps, no purpose would be served by allowing him to repeat that process through the collateral route, beginning often with the same district judge who presided at his trial. Absent a showing that the presentation of his claim was impeded, the foreclosing of collateral relief for that defendant risks the denial of federal rights to no greater extent than the holding in *Sanders* v. *United States*, 373 U.S. 1, that a district court need not entertain a repeater motion raising a claim which had previously been decided on its merits against the petitioner in a prior Section 2255 proceeding.

To be sure, that is not this case. Petitioner presumably would argue that the failure to move to suppress the evidence, the failure to object to the admission of the evidence on the grounds that it was obtained by a warrantless search, and the failure to brief and argue the search and seizure claim on appeal,

would not preclude a State prisoner from maintaining that claim on federal habeas corpus. Because of the continued access to a federal forum enjoyed by the federal defendant, however, the result in a comparable case involving a State prisoner would not be controlling here. As Professor Amsterdam stated (112 U. Pa. L. Rev. at 381):

> Granted * * * [that a State defendant, under *Fay* v. *Noia, supra*] does not lose the federal habeas corpus hearing, to which *Brown* v. *Allen* entitles him from the beginning, merely because he fails to press his federal claim before a state tribunal which in no case could dispose of it definitively against him. It does not follow that the federal accused who fails to present a timely and effective constitutional contention to a potentially dispositive federal forum thereby gains a second litigating opportunity which would not otherwise have been open to him.

3. A rule excluding evidence obtained in violation of the Fourth Amendment has been in effect in the federal courts since *Weeks* v. *United States*, 232 U.S. 383, decided in 1914. A motion to suppress such evidence has been available under Rule 41(e) of the Rules of Criminal Procedure since they were first adopted in 1946, and was established by judicial decision before that time. The rule provides:

> * * * The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

In most instances, at least the minimal circumstances surrounding any search and seizure are known by defense counsel before trial, or at the very latest, when the evidence is offered at trial. It is desirable that the issues be litigated promptly, while memories are still fresh. Moreover, the facts which relate to the validity of a search and seizure, are often not germane to the trial at all, and even when germane, there is no necessity to develop all the details which would be relevant on the search and seizure question. As this Court said in *Jones* v. *United States*, 362 U.S. 257, 264:

> This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystalization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt.

Accordingly, a search and seizure claim which was not preserved by motion to suppress generally may not be raised on appeal, absent a clear showing of excusable neglect.[13] Where the facts showing an invalid

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[13] See *e.g.*, *Katz* v. *United States*, 321 F. 2d 7, 9 (C.A. 1), certiorari denied, 375 U.S. 903; *United States* v. *Nicholas*, 319 F. 2d 697, 698 (C.A. 2), certiorari denied, 375 U.S. 933; *United States* v. *Paradise*, 334 F. 2d 748 (C.A. 3); *United States* v. *Blythe*, 325 F. 2d 96 (C.A. 4); *Zachary* v. *United States*, 275 F. 2d 793, 795-796 (C.A. 6), certiorari denied, 364 U.S. 816; *United States* v. *Burrell*, 324 F. 2d 115, 119 (C.A. 7), certiorari denied, 376 U.S. 937; *Gendron* v. *United States*, 295 F. 2d 897, 902 (C.A. 8); *Kuhl* v. *United States*, 370 F. 2d 20, 21 (C.A. 9) (*en banc*); *Isaacs* v. *United States*, 283 F. 2d 587, 589-590 (C.A. 10).

search and seizure appear of record, the court may consider the issue under the plain error doctrine.[14] But even where the facts do appear on the record, courts have not necessarily deemed the issue subject to the plain error rule. For example, in a recent, hotly contested prosecution, some items of evidence, seized pursuant to a warrant from the home of one of the defendants, were introduced in evidence without objection. On appeal, the court declined to consider the issue because of the absence of objection (*Wilkins* v. *United States,* 376 F. 2d 552, 563 (C.A. 5), certiorari denied, 389 U.S. 964), although on the same day the court reversed the conviction, for another offense, of the defendant from whom such items had been taken, on the ground that the search warrant, which had been challenged in that separate prosecution, was invalid. *Thomas* v. *United States,* 376 F. 2d 564 (C.A. 5). There would be no reason now to allow the unchallenged admission of that evidence to be a basis for a collateral attack on the conviction which was fully sustained by other evidence. See *Indiviglio* v. *United States,* 352 F. 2d 276, 281 (C.A. 2), certiorari denied, 383 U.S. 907.

The rules designed to assure orderly procedure and full development of the relevant facts at an appropriate time before trial would become meaningless under the holding for which petitioner contends. If a defendant who refrains from making a motion to

[14] *Gray* v. *United States,* 311 F. 2d 126, 127 (C.A.D.C.), certiorari denied, 374 U.S. 838; *Smith* v. *United States,* 335 F. 2d 270, 274, n. 13 (C.A.D.C.); *Sykes* v. *United States,* 373 F. 2d 607 (C.A. 5), certiorari denied, 386 U.S. 977.

suppress before trial can in effect make a delayed motion for suppression after the judgment has become final, there would be, particularly as to items not important to a conviction, strong motives to delay presentation of the issue. For then there is a good chance not only that memories will have become dim as to the circumstances of the search, but that the items of evidence can be endowed with significance they may not have had if the prosecution knew it had to be put to other proof. And if a new trial should be required, there is always the possibility that lapse of time will render retrial difficult or impossible. There is no reason to encourage such a result.

B. THERE ARE NO EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT CONSIDERATION OF PETITIONER'S CLAIM OF ILLEGAL SEARCH AND SEIZURE ON COLLATERAL ATTACK

1. The "exceptional circumstances" in which search and seizure claims not raised at trial or on appeal should be entertained collaterally reflect both the public's interest in preserving the deterrent effect of the exclusionary rule and the defendant's fundamental right to a fair hearing. We will not attempt to detail all of the particular situations in which an exception should be made. The basic inquiry, however, is whether there were any impediments to the defense's making an informed election whether to raise the claim, and if the claim is sought to be presented, whether the hearing on the claim was fundamentally fair. Suppression of material evidence or the knowing use of perjured testimony by the prosecution justifies collateral litigation of the claim as a means to disable

the government from concealing its own illegality.[15] The discovery, after the judgment has become final, of significant evidence relative to the search would ordinarily entitle the defendant to raise the issue collaterally, if it reasonably appears that the absence of the evidence may have influenced the decision not to raise the claim. In the unlikely event that the conduct of the judge or the prosecutor denied the defendant a fair hearing on the search and seizure claim, and that error is not corrected on appeal, collateral review of the claim would also be warranted.

The above illustrations represent, we suppose, atypical situations. In most cases, like the present, collateral review is sought to be justified by reason of counsel's default in presenting the search and seizure claim at trial or on appeal. However, unless trial or appellate counsel's handling of a search and seizure claim is so grossly negligent—*e.g.*, failing to raise an obvious claim with respect to damaging evidence—as to constitute ineffective assistance under Sixth Amendment standards, collateral review of the search and seizure claim should not be available. *Thornton* v. *United States, supra,* 368 F. 2d at 829. In this context, the defendant's interest in an informed election and a fair hearing and the public's interest in the efficacy of the exclusionary rule coalesce. The defendant's enforcement of the exclusionary rule—which is made in a representative capacity on behalf of the public—is, like most other defenses available to an accused, committed largely to the skill and judgment of his counsel. When counsel makes a reasonable determination that it would be pointless to challenge the

[15] Compare *Miller* v. *Pate*, 386 U.S. 1.

admissibility of seized evidence, or when his presentation of the claim is not constitutionally deficient, the concerns of both the public and the accused are satisfied.

2. In view of the evidence available to the government, trial counsel, who frequently consulted with petitioner (Tr. 481, A. 19), reasonably determined that the best defense was a claim of insanity. The evidence seized from the car was plainly immaterial to that defense, and did not warrant counsel's challenging its admission by motion to suppress (see A. 77). Since petitioner has shown himself fully alert as to his legal rights, that strategy manifestly met with his approval. The strategy having failed, petitioner now seeks an additional opportunity to persuade another jury. Neither the appellate process nor collateral relief was intended to afford a "trial by hindsight." *Kuhl* v. *United States*, 370 F. 2d 20, 23 (C.A. 9).

It is also clear from the record that appointed appellate counsel did consider the issue of search and seizure and did not deem it worthy of presentation before the court of appeals. We think this judgment was correct for a number of reasons—because the evidence was not important, because no motion to suppress had been made, and because the facts do not show an illegal search and seizure. Counsel's duty to his client is not well served by raising frivolous contentions. But even if other reasonable lawyers might have elected to argue the issue, that would not show incompetence of counsel nor neglect of duty. See *King* v. *Wainwright*, 368 F. 2d 57 (C.A. 5); *United States* v. *Follette*, 358 F. 2d 922 (C.A. 2); *Anderson* v. *Bannan*, 250 F. 2d 654 (C.A. 6); *Taylor* v. *United States*, 238 F. 2d 409 (C.A. 9), certiorari denied, 353 U.S. 938;

Palakiko v. *United States*, 209 F. 2d 75 (C.A. 9). Moreover, when counsel was informed of petitioner's desire to assert a search and seizure claim, counsel took steps to do so.[16] He arranged to have petitioner's wish to rely on *Preston* presented to the panel which heard the case. The fact that the panel did not mention the issue does not mean they did not consider it. For the reasons mentioned above—the unimportance of the evidence, the absence of a motion to suppress, the inapplicability of *Preston*—the court could have regarded the claim as too frivolous to warrant discussion.

III. THE TESTIMONY AT TRIAL PLAINLY SHOWS THAT THE EVIDENCE WAS LAWFULLY OBTAINED

Even if the Court should hold that petitioner may obtain collateral review of his search and seizure

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[16] Petitioner's statement (in his affidavit attached to the brief in this Court) that "to the best of my memory, I told him [appellate counsel] that * * * evidence obtained from my person and my car subsequent to my arrest should have been excluded as evidence at my trial," (Br. App. B) contradicts petitioner's letter to appellate counsel which was written months after the filing of the brief and oral argument. In a letter dated April 26, 1965, petitioner wrote to counsel in pertinent part: "I have *discovered* a very serious and prejudical [sic] error in the trial. * * * I have nothing but time to research, so please don't feel the fact that I *found* this error reflects on you in any way. * * *." (Br. App. D [emphasis added]). This letter almost conclusively indicates that petitioner urged counsel to present the alleged error only after briefing and oral argument, not before, as is asserted in his affidavit. This view is further supported by the affidavit of Mr. Diggs in which he states that "[f]ollowing my oral argument in the case Mr. Kaufman, by letter to me dated April 26, 1965, raised the issue of illegal search and seizure. * * * I had not raised the issue before the court, by brief or by oral argument, considering it to be of little merit" (Br. App. C).

claim, there would be no need to remand the case for a hearing on the merits of that claim. Although there was no motion to suppress, the testimony at trial contains sufficient facts to support a finding that the challenged evidence was not the product of an illegal search.

1. Since petitioner's motion to vacate sentence did not attack the validity of the search of his person, his present contention that the stolen money and the rental contract should not have been admitted in evidence is not properly before this Court. But, in all events, that contention is adequately refuted by the record. While the facts were not developed in detail, the evidence shows that those items were taken from petitioner during the routine procedures incident to an accused's detention in a station house (A. 98). Captain Peterson of the Alton Police Department testified that the personal effects removed from petitioner's person and inventoried by the police included "valuable items * * * such as money [and a] billfold" (A. 71). Petitioner does not challenge the legality of his arrest and detention in the station house on the "hit-and-run" charge, which is hardly a minor traffic violation. The search of his person to discover any concealed weapons and to remove valuable items was a necessary precaution to protect the police and to safeguard petitioner's property. See *Terry* v. *Ohio,* 392 U.S. 1, 22, 27; cf. *Preston* v. *United States,* 376 U.S. 364, 367.

2. The revolver was plainly admissible in evidence on any one of three grounds. In the first place, it was observed, in plain view, on the rear seat of the auto-

mobile (A. 65, 59). The discovery of the weapon, therefore, was not the result of a "search" within the meaning of the Fourth Amendment. *E.g., Harris* v. *United States,* 390 U.S. 234; *Ker* v. *California,* 374 U.S. 23, 42–43. Second, the revolver was found and removed from the car by Cliff Martin, a private individual who had been called to tow the disabled vehicle off the street. The manner in which private citizens obtain evidence which is later turned over to the authorities is not measured by Fourth Amendment standards. *Burdeau* v. *McDowell,* 256 U.S. 465, 475. Finally, the record shows that Martin's conduct did not violate any duty owed to petitioner. Petitioner does not contend that Martin wrongfully took custody of the automobile. Martin clearly acted reasonably in removing a potentially lethal weapon from an unattended automobile and giving it to the F.B.I. agents, who had a right to possession of the revolver as the instrumentality of a federal offense.

3. The travelers' cheques, traffic summons, gasoline receipts, and Western Union receipt were found in the automobile by an F.B.I. agent after petitioner had been removed to the F.B.I. office in St. Louis (A. 78–79, 101). Petitioner does not contend that the agents lacked probable cause to take him into custody on a federal charge or to search the automobile (see pp. 6–8, *supra*). Relying on *Preston* v. *United States,* 376 U.S. 364, he argues only that the search was invalid because it was not conducted pursuant to a warrant.

In *Preston,* the Court held invalid a warrantless search made after the defendants had been arrested and jailed for vagrancy and after the automobile had

been driven off the street by the police and placed in a garage. In this case, however, the agents knew that the car, which had been in a serious accident, had been petitioner's get-away car and had been used to transport stolen money across a State line. The revolver which petitioner used had been found in the car, but the stolen travelers' cheques had not been recovered. And the agents also knew that the car did not belong to petitioner but had been rented by someone else. The search of the car "was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained" (*Cooper* v. *California,* 386 U.S. 58, 61).

In almost identical circumstances in *Cooper,* this Court sustained a warrantless search of an automobile at a time and in a place remote from the arrest. Petitioner attempts to distinguish *Cooper* on the fact that in that case the car was seized under a State statute authorizing the forfeiture of vehicles used to facilitate the transportation of narcotics. But the important factor in both *Cooper* and the present case is that the petitioner was not entitled to immediate possession nor ultimate control of the car. In this case, the government had the right to immediate possession because the car was an instrumentality of the crime, to be held until petitioner's trial, and the owner of the car was entitled to ultimate possession. In these circumstances, a search without a warrant is reasonable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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